NO. 90-1041

Supreme Court, U.S.
FILED
DEC 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

October Term 1990

GILBERT DiLUCIA, MARION L. PALMER, and COOPER HILLS, ESTATE, INC.,

Claimant,

-vs-

TOWN BOARD OF TOWN OF WESTFORD and MARTIN PEETERS, Town Superintendent of Highways,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE THIRD DEPARTMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

FRANK POLICELLI, ESQ.
Counsel of Record
1006 Park Avenue
Utica, New York 13501
(315) 793-0020
Attorney for Claimant-Petitioner

(2603)

Spaulding Law Printing
Syracuse, New York

28 P

QUESTIONS PRESENTED

Did the Town of Westford deny the Petitioner his property with out Due Process of Law by refusing to accept the dedication of roads by Cooper Hills Estate?

LIST OF PARTIES

The only parties to this action are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	5
1. The conduct of the Town of Westford that led to the Town refusing to accept the dedication of roads in Cooper Hills Estate deprives the Petitioner his property without Due Process of Law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States	5
CONCLUSION	7

APPENDICES

		Page
Appendix I	- Order Denying Motion for Leave to Appeal to the New York State Court of Appeals	I-1
Appendix II	- Opinion and Order from the Third Department of the Appellate Division of the Supreme Court of New York State	II-1
Appendix III	- Opinion and Order of the Supreme Court of the State of New York in the County of Otsego	III-1
Appendix IV	- Excerpts from the Record showing that the Federal question sought to be reviewed was first raised by Petitioner in his proceeding in State Court.....	IV (a)-1 - (c)-1
Appendix IV(a)	- Portions of Petitioner's Petition that raise the Federal question presented in this Writ.....	IV (a) - 1
Appendix IV(b)	- Portions of lower State Court decision involving Federal question presented in this Writ	IV (b) - 1
Appendix IV(c)	- Portion of State Appellate Court decision involving Federal question presented in this Writ	IV (c) - 1

TABLE OF AUTHORITES

Cases **Page(s)**

Acorn Ponds v. Incorporated Village of North Hills
623 F. Supp. 688 (E.D.N.Y. 1988) 6

Board of Regents v. Roth
408 U.S. 564; 33 L. Ed. 2d 548 (1972) 5

Lynch v. Household Finance
405 U.S. 538; 31 L. ED. 2d 424 (1972) 5

Sullivan v. Town of Salem
805 F2d 81 (Second Circuit 1986) 5,6

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

GILBERT DiLUCIA, MARION L. PALMER, and COOPER HILLS, ESTATE, Inc.,

Claimant,

-vs-

TOWN BOARD OF TOWN OF WESTFORD and MARTIN PEETERS, Town Superintendant of Highways,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE THIRD DEPARTMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

Gilbert DiLucia petitions this Court for a Writ of Certiorari to review the judgment of the Third Department of the Appellate Division of the Supreme Court of the State of New York rendered May 1, 1990.

OPINIONS BELOW

the opinion of the Third Department for the Appellate Division of the Supreme Court of the State of New York has not been reported. (App. II, infra, II-1 to II-3.) The Supreme Court of the State of New York in the County of Otsego has rendered an opinion. (App. III, infra, III-1 to III- 10.)

JURISDICTION

The Third Department for the Appellate Division of the Supreme Court of the State of New York entered judgment on May 1, 1990 (App. II, infra, II - 1 to II - 3.), and leave to the New York State Court of Appeals was denied on September 11, 1990. (App. I, infra I - 1.) This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT

In April, 1986, Petitioner Gilbert DiLucia purchased two hundred and ninety acres of land in Westford, New York. DiLucia began developing the land, and through the corporation of Cooper Hills Estate, Inc. built seven houses and four roads. Cooper Hills is in snow country. It lies two miles from the center of Westford, New York and is 600 feet higher in elevation than Main Street. Snow removal is a necessity and not a luxury. Before starting construction Petitioner attemped to resolve the issue of who would maintain the roads Cooper Hills developed. The construction supervisor inquired of the Town Highway Superintendent whether there would be any problem with the town plowing the roads if they built according to Donovan Plan Specifications. The Highway Superintendent indicated that plowing the roads was within the capability of his work force. In fact, new snow removal equipment was purchased in 1988 using tax money paid to the Town by Cooper Hills. In response, the Highway Superintendent stated that as lon as appropriate turning circles were provided, he did not see any problem with plowing since it would only take approximately 15 minutes for his trucks to pass over the new roads with snow plows. Throughout the developing of Cooper Hills Estates Dilucia met with the Town Board of Westford with a view and implicit understanding that the Town was going to take over the roads of Cooper Hills. DiLucia's requests that the Town accept dedication of his roads were answered by the Board by saying that no action would take place on acceptance until approvals were obtained by DiLucia from the Planning Board. It is submitted that when DiLucia opted to build a housing development in the Town of Westford there was no Planning Board or any legislation that prohibited him from expecting that the Town would maintain the roads of Cooper Hills Estates. The Town had not accepted the dedication of any roads in the last thirty years because no roads were ever offered for dedication in that time span. The Town minutes show DiLucia made two requests that the Town Board accept dedica-

tion of his roads. In both cases the miutes state that the Town Board would not consider the application until "approvals were obtained from the Planning Board."

A Town Planning Board was set up to deal with the acceptance of the roads of Cooper Hills in 1987. The creation of the Town Planning Board was an overt act by the Town that encouraged DiLucia to believe that the Town was taking over the roads of Cooper Hills Estates. Over the next year, DiLucia complied with the recommendations set down by the Town Planning Board. A turning circle on one road was widened and approved by the Highway Superintendent and the Fire Chief to make sure their snow plows and fire engines had enough room to make a circular turn. A "T" was created on another road to accommodate the same town vehicles. A dry hydrant was installed by the lake at Cooper Hill as requested by the Fire Chief. Final approval of the road plan was eventually given by the Planning Board. This type of encouraging action by the Planning Board was reinforced by the Town Attorney who asked DiLucia's attorney to submit deeds of the roads to the Town Board at it meeting on December 4, 1987. The Town Board retained possession of the deeds. After retaining the deeds the Board then set up more specifications in March to be complied with. At the Town Board meeting of October 7, 1988, the application of the standards created at the March meeting to DiLucia were discussed. The Board stated that DiLucia was not in full compliance with all of its regulations. The Board also stated that its new regulations (stating that the base should be four inches of gravel under two inches diameter instead of using the Dononvan Specifications) would be applied to DiLucia's roads despite the earlier assurances given by the Town Highway Superintendent eighteen months earlier that compliance with Donovan Specification would be sufficient. Two Board members stated they would not vary their decision regardless of the facts. It should be pointed out that the March 4, regulations were purported to be applicable for "all future roads", but the Board applied them to DiLucia's roads regardless of its own rules and over DiLucia's objection.

On December 2, 1988, in an apparent reversal of policy the Town Board decided that it would not take over any rods AT ALL, and rescinded the list of standards passed at the March meeting. DiLucia contends that this abrupt change in Town Board policy is by itself an abuse of discretion and therefore an arbitrary and capricious act. The Town Board refused to answer any questions as to when Petitioner's road would be accepted. The Board did not give a

reason for refusing to accept new roads. It should be noted that the Highway Department is not overcommitted since no new roads have been accepted in thirty years.

While the general rule appears to be that a town cannot be compelled to accept a private road, Petitioner contends that when a Planning Board is specially created to process Petitioner's application, and Petitioner expends the time and money to comply with the Planning Board's recommendations, the Town Board at a later date cannot by whim and caprice, decide to abolish the very procedure it asked Petitioner to follow, thus refusing to exercise the reasonable discretion vested in it by law.

It is submitted by DiLucia that in the instant case he was led to believe that the Town would accept the roads at the very beginning of construction by the Highway Superintendent. DiLucia acted on this representation and was never told that the Town would not accept his roads during months of construction. This construction was visible to the Town Authorities. It was only *after* DiLucia had built four roads and seven houses that the Town Board set up a Planning Board and addressed the issue of accepting DiLucia's roads. For several months the Planning Board created specifications for DiLucia to comply with in the nature of ex post facto laws. DiLucia complied with these regulations and the Town still refused to accept his roads. The approval of the Planning Board became meaningless since the Town acted with absolute power to reject the equities of DiLucia's compliance with the Planning Board's specifications and take the position that the Town has the absolute discretion to never accept any new roads. The ex post facto specifications that DiLucia is made to comply with would require him to tear up his roads and suffer financial hardship at this late date.

It is the contention of DiLucia that after years of developing and relying on the representations that his roads would be accepted that at some point a duty should be imposed on the Town to accept the roads of the developer and to do otherwise is a deprivation of DiLucia's property rights without Due Process of Law. As a taxpayer DiLucia is being denied the only service provided by the Town of Westford - snowplowing. Snowplowing is a necessity in this part of the state and DiLucia receives no service from the Town of Westford whatsoever despite the enormous taxes he has to pay. It appears eminently unfair to allow a Town Board to have such unfettered discretion to whimsically decide not to accept the dedication

of roads when it has encouraged the developer to build thinking all the time that the Town will accept the roads. This Court should state whether this policy is constitutional and examine the Town's duty to accept roads.

The Federal question sougnt to be reviewed was first raised by the Petitioner in his proceeding in State Court (App. IV (a), infra IV(a)-1 to IV(c)-1.) The lower State Court and State Appellate Court decided that no Due Process violation took place (App. IV(b), infra IV(b)-1. and App. IV(c), infra IV(c)-1.).

REASONS FOR GRANTING THE PETITION

1. The Conduct of the Town of Westford that led to the Town Refusing to Accept the Dedication of Roads in Cooper Hills Estate deprives the Petitioner his property without Due Process of Law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States

This case raises the important general constitutional issue of whether the conduct of a Town in dealing with a real estate developer violates the developer's property right's under the Due Process Clause of the Constitution by creating an expectation that the Town will take over the roads in the development so that the developer will construct the development. It is important for this Court to give guidance as to what the appropriate standards should be for Towns in exercising their discretion with their dealings with land developers. The state of the law is unclear as to how far a Town can go to lead a developer to believe that the Town will accept dedication of roads. Principles of estoppel and equity come in play in determining what the process is due landowners in disputes with Towns as to what services the landowners can expect the Town to provide. Obviously, the services provided by the Town are relevant factors to the developer in seeking areas to develop. It is unfair for a Town to lure a developer into an area by representing that the Town will accept dedication of roads and then create years of "hoop-jumping" to ultimately end up not accepting the roads but collecting heavy taxes from the developer. It is submitted that when a Town acts in such a way so as to induce the developer to develop, because of representations made by the Town, then there exists a legetimate claim on the part of the developer to be entitled to that

benefit which in the instant case is the acceptance of the roads. ***Board of Regents v. Roth*** 408 U.S. 564, 33 L. ED. 2d 548 (1972); ***Lynch v. Household Finance*** 405 U.S. 538, 31 L. ED. 2d 424 (1972); ***Sullivan v. Town of Salem*** 805 F2d 81 (Second Circuit 1986).

The rule this Court enuciated in ***Roth***, supra, finds a sufficient property interest for Due Process purposes based on "claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined" 408 U.S. 564, 577. The concept of ***Roth*** was applied by the Second Circuit Court of Appeals in ***Sullivan v. Town of Salem***, supra. In Sullivan, the Town of Salem engaged in conduct where it unfairly failed to issue Certificates of Occupancies thus creating a legitimate claim of entitlement on the part of Sullivan to the issuance of the Certificates of Occupancy and thus establishing a property interest to be afforded Due Process instead of a unilateral expectancy not rising to the level of a property right guaranteed against deprivation by the Fourteenth Amendment. The Circuit Court did not find a property interest on the part of Sullivan to have his roads accepted despite footdragging and bad faith on the part of the Town because Sullivan had other legal avenues under Connecticut State Law to have his roads accepted. The question remains open for this Court to decide whether given practically the same factual situation of ***Sullivan*** in the case at bar, when there is no adequate state remedy, whether a property interest exists in the acceptance of roads. The rationale of ***Sullivan*** indicates that such an interest could be found in the acceptance of roads when the developer complies with the applicable state and municipal requirements and the Town acts in a way that indicates it intends to accept the roads providing the developer comply with all the Town's demands. No discretion is left to the Town if the developer fully complies with all the requirements. The expectation the developer has that he will receive a benefit is reasonable and not unilateral because the Town's conduct has caused the developer to rely that the Town will accept the roads when all the Town's demands are met.

In ***Acorn Ponds v. Incorporated Village of North Hills*** 623 F. Supp. 688 (E.D.N.Y. 1988) it was held that a developer had every reason to rely on the representation implicit in issuing the building permits that Certificates of Occupany would be granted if the building were constructed in accordance with the plans upon which the building permits wer issued. This reliance, it was held, is more than a unilateral expectation that Certificates of Occupancy would be issued. In the instant case the Petitioner's reliance on the representations by the Town was more than a unilateral expecta-

tion. ***Acorn Ponds*** found a property interest based on certain members of the Board's abuse of power and arbitrariness of decisions. The Petitioner in the instant case is the victim of the same type of abuse found in ***Acorn Ponds,*** supra and ***Sullivan***, supra. If the Town did not lead Petitioner to believe it would accept his roads he never would have bought and develope the property and gone through four years of complying with requirements where he had no adequate post-deprivation procedure.

Dated: December, 1990

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BY:/s/ *Frank Policelli, Esq.*

FRANK POLICELLI, ESQ.
Counsel of Record

APPENDIX

State Of New York, Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eleventh *day of September A.D. 1990*

Present, Hon. Sol Wachtler, Chief Judge,presiding

3-10 Mo. No. 651

In the Matter of Gilbert DiLucia et al.,

Appellants,

-vs-

Town Board of Town of Westford et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Donald M. Sheraw
Clerk of the Court

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 12th day of March, 1990.

PRESENT:
HON. A. FRANKLIN MAHONY
Presiding Justice,
HON. T. PAUL KANE
HON. PAUL J. YESAWICH, JR
HON. THOMAS E. MERCURE
Associate Justices

STATE OF NEW YORK APPELLATE DIVISION
SUPREME COURT THIRD JUDICIAL DEPARTMENT

In the Matter of
GILBERT DI LUCIA, MARION L. PALMER, and COOPER HILLS, ESTATE, INC.,

Appellants,

-vs-

ORDER
Index No. 46304

TOWN BOARD OF TOWN OF WESTFORD, and MARTIN PEETERS, Town Superintendent of Highways,

Respondents.

The appellants having appealed from an order of the Supreme Court of Otsego County, entered on the 5th day of April, 1990, in the Office of the Clerk of the County of Otsego, and said appeal having been presented during the above-stated term of this court, and been argued by Frank Policelli, Esq., on behalf of the appellant, and by Marvin D. Parshall, Esq., on behalf of the respondents, and, after due deliberation, the court having rendered a decision on the 19th day of April, 1990, it is hereby

ORDERED that the judgment so appealed from be and hereby is affirmed, without costs.

/s/ Michael J. Novack

Clerk

DATED AND ENTERED: May 1, 1990

Supreme Court. Appellate Division
Third Judicial Department

April 19, 1990
59978

In the Matter of GILBERT
DI LUCIA et al.,

Appellants,

-vs-

TOWN BOARD OF TOWN OF WESTFORD
et al.,

Respondents.

YESAWICH, JR., J.

Appeal from a judgment of the Supreme Court (Mugglin, J.), entered April 5, 1989 in Otsego County, which dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to compel respondents' to accept dedication of petitioners' private roads.

In 1986, petitioner Gilbert DiLucia purchased approximately 290 acres of vacant in the Town of Westford, Otsego County, and created the Cooper Hills Estates housing development. Before constructing roads within the development, Cooper Hills Estates' construction supervisor solicited and obtained from the Town Highway Superintendent the latter's opinion that as long as appropriate turning circles were provided, no problem plowing snow on the contemplated roads was anticipated. Petitioners then constructed the four roads in the development.

Pursuant to regulations promulgated by the Town's Planning Board in 1987, the Planning Board considered petitioners' subdivision plat. Thereafter, DiLucia made two formal requests of respondent Town Board to have it accept dedication of the roads, but the Town Board refused to entertain either application until the Planning Board approved the subdivision. Seven months later, in March 1988, the Town Board adopted a resolution reciting the standars to be met before it would undertake to maintain roads in future developments. On August 15, 1988, the Planning Board conditionally approved petitioners' subdivision; petitioners thereafter installed a dry hydrant and constructed a "T" turn on one of the roads as the Planning Board had requested. Though

Supreme Court. Appellate Division
Third Judicial Department

aware of the Planning Board's approval, the Town Board adopted a resolution declaring that the Town Board's policy at the present time was not to take over any new roads. The Town Board's refusal to accept petitioners' offer of dedication prompted petitioners to institute this proceeding to compel the Town to do so. Supreme Court found no support for petitioners' contention that the Town implicitly accepted the dedication and dismissed the petition; we affirm.

Cognizant that a town cannot be compelled to accept a provate road (***see generally, Matter of Hillelson v Grover,*** 105 AD2d 484, 485; ***Carman v Hewitt***, 105 NYS2d 239, 243-244, ***mod on other grounds*** 280 App Div 866, ***Affd*** 305 NY 718), petitioners' primary contention on appeal is that because they expended time and money to comply with the Planning Board's recommendations and because the Town Highway Superintendent implied that the dedication would be accepted, the Town Board should be estopped from arbitrarily denying their offer. Neither a town superintendent nor a planning board may bind a municipality to accept a proffered dedication absent the town board's consent (***see***, Highway Law § 171; ***Entress v Sours***, 272 App Div 861; ***Koff v Frank***, 22 Misc 2d 551, 555). And, in any event, estoppel is generally unavailable against municipalities and their agencies (***see, King v City of Newburgh***, 84 AD2d 388, 394-395; ***see also, Matter of Hamptons Hosp. & Med. Center v Moore***. 52 NY2d 88, 93-94; ***Matter of Burns v Regan***, 87 AD2d 944, 946, ***appeal dismissed*** 57 NY2d 954).

Nor do we find the Town Board's refusal to accept petitioners' roads to be arbitrary or capricious. The uncontroverted record evidence is that the Town has not accepted any roads in the last 30 years. Moreover, petitioners have failed to demonstrate that the Town Board's action lacks a sound basis in reason. Although petitioners suggest, for the first time in their brief, that the Town Board's failure to explain its decision renders it arbitrary, issues not raised in Supreme Court may not be raised for the first time on appeal (10 Carmody-Wait 2d, NY Prac § 70:300, at 564; ***see, e.g., Matter of Desmond v Jones***, 87 AD2d 902).

Judgment affirmed, without costs.

MAHONEY, P.J., KANE, YESAWICH, JR., and MERCURE, JJ., concur.

STATE OF NEW YORK
SUPREME COURT COUNTY OF OTSEGO

GILBERT DiLUCIA, MARION L. PALMER, and COOPER HILLS ESTATES, INC.,

ORDER
Index No. 46304
RJI No. 88-0448

Plaintiffs,

-vs-

TOWN BOARD OF TOWN OF WESTFORD and MARTIN PEETERS, Town Superintendent of Highways,

Defendants.

Upon reading and filing the Notice of Petition of the petitioners dated December 30, 1988, with petition of Gilbert DiLucia and Marion L. Palmer, with attached exhibits, verified the 30th day of December, 1988 and affidavits of Ronald Ross and Mark DeGruchy both sworn to December 30, 1988 for an Order compelling the respondents to dedicate, takeover and maintain the private roads of the petitioners as public highways, and the respondents having answered the petition by a verified Answer dated January 11, 1989, together with affidavits of the Town Attorney, Marvin D. Parshall, sworn to the 11th day of January, 1989; Philip Strong, Town Supervisor, sworn to January 6, 1989, Martin Peeters, Highway Superintendent, sworn to January 6, 1989, Wilber Bush, former Supervisor and Highway Superintendent, sworn to January 10, 1989, and Lynn E. Green, Jr., former Town Attorney, sworn to Janyary 6, 1989, and with due proof of service of all the aforesaid documents upon the respective parties and their attorneys; and the matter having come on for hearing before this Court on the 17th day of January, 1989, at a Special Term Whereof in the Supreme Court Chambers, 242 Main Street, Oneonta, New York, and Attorney Philip F. Wolff having Appeared on behalf of the petitioners in support of said motion, and Town Attorney, Marvin D. Parshall, having appeared on behalf of the respondents in opposition thereto, and Arguments having been presented by both counsel, and a Memorandum of Law having been submitted

by both counsel, and a Supplemental Affidavit by Attorney Joseph Kehoe, sworn to January 17, 1989, with attached exhibits having been filed by the petitioners, and a Supplemental Reply Affidavit by Joan Bramsen, Town Clerk, sworn to February 8, 1989, and Lynn E. Green, Jr., former Town Attorney, sworn to February 9, 1989, with attached letter from Town Attorney, Marvin D. Parshall, dated February 9, 1989, having been filed by respondents, and due deliberation having been had and a Decision having been rendered by this Court, dated March 16, 1989, it is hereby

ORDERED, that the Petition of the petitioners be dismissed and that any and all relief sought by the petitioners is hereby denied, and it is further

ORDERED, that a copy of the Decision be annexed to this Order and incorporated therein by reference.

Dated: April 3, 1989

ENTER

/s/

J.S.C.

At an IAS Term of the Supreme Court of the State of New York, held in and for the County of Otsego, at Chambers, 242 Main Street, Oneonta, New York, on the 17th day of January, 1989

PRESENT: HON. CARL J. MUGGLIN,

Justice

SUPREME COURT STATE OF NEW YORK
COUNTY OF OTSEGO

GILBERT DiLUCIA, MARION L. PALMER and COOPER HILLS ESTATES, INC.,

Petitioners,

-against-

TOWN BOARD OF TOWN OF WESTFORD and MARTIN PETERS, Town Superintendent of Highways,

Respondent.

DECISION
Index No. 46304
RJI No. 88-0448

APPEARANCES:

PHILIP F. WOLFF, ESQ.
Attorney for Ppetitioner
830 Black River Boulevard
Rome, New York 13440

MARVIN D. PARSHALL, ESQ.
Attorney for Respondents
111 Main Street
Worcester, New York 12197

During 1986, the petitioner, Gilbert Dilucia, purchased approximately 290 acres of vacant land in the Town of Westford, County of Otsego. Therafter, petitioner undertook to subdivide the land, thereby creating a housing development known as Cooper Hills Estates.

The tract of land was divided into three separate and distinct sections for subdivision purposes. The subdivision plat for Sections 1 and 2, which sections included Gates Drive and Palmer Road, was filed in the Otsego County Clerk's Office on August 28, 1986. Between the months of June and October, 1986, the petitioners constructed the four roads throughout the entire development.

Prior to the construction of the roadways within the development, the construction supervisor inquired of the Town Highway Superintendent whether there would be any problem with the town plowing the roads if they were built according to Donovan plan specifications. In response, the highway superintendent indicated that as lon as appropriate turning circles were provided, he did not see any problem with plowing since it would take only approximately 15 minutes.

During 1987, the Town of Westford created a planning board which adopted subdivision regulations on April 3, 1987. These regulations were approved by the Town Board on April 17, 1987, the effective date of the regulations. Pursuant to these regulations, the petitioner filed with the Westford Planning Board, the subdivision plat with regard to Section 3, which plat was ultimately approved on August 15, 1988.

The petitioner alleges that he has made numerous offers to formally dedicate the roadways within the subdivision to the Town of Westford. However, the Town Highway Department has not undertaken maintenance, snow removal and the like with respect to said roads. In order to accomplish the dedication, the petitioner prepared and delivered to the Town Board at its meeting on December 4. 1987 a proposed deed regarding Palmer Road and Thomas Road. At that meeting, the Town Board retained possission of the deed and tabled the matter pending receipt of the recommendation of the Planning Board. On March 4, 1988, the Town Board adopted a resolution regarding minimum construction requirements regarding roadways which are to be dedicated to the municipality and provided that acceptance of all such offers was discretionary with the Board. On December 2, 1988, the Board

adopted a resolution indicating that the Town of Westford, at the present time, would not accept the dedication of any new roads.

As a result of the foregoing, the petitioners have instituted this proceeding pursuant to Article 78 of the Civil Practice Law and Rules seeking a judgment in the nature of mandamus to compel the Town of Westford to accept the offer of dedication of the roadways within Cooper Hills Estate. The proceeding is premised upon the municipality having accepted the offer of dedication and/or that in rejecting or failing to accept the dedication, the municipality has acted in an arbitrary and capricious fashion.

The petitioners argue that the respondents have accepted the roads as a result of three separate and distinct actions, namely: (a) representations of the Town Highway Superintendent regarding acceptance of a dedication which representations are binding upon the Town Board, (b) retention of deed of dedication to Palmer Road and Thomas Road by the Town Board, and (c) approval by the Planning Board of Section 3 of the subdivision. If indeed the town has accepted the roadways in question, then the municipality is under a legal duty to maintain said roadways, the remedy of mandamus being available to compel a municipality to perform its legal duty.

Clearly, a town highway superintendent cannot bind a municipality regarding acceptance of proffered dedications. The action of the Town Highway Superintendent regarding dedication of roadways must be with the consent of the Town Board. See Section 171, Highway Law. Without the consent of the Town Board, the Town Highway Superintendent has no authority to act for the town or bind it with respect to the acceptance of proposed dedications. ***Hillelson v. Grover***, 105 AD2d 484 (Third Dept., 1984).

Likewise, under the circumstances presented herein, assuming that a properly executed deed was delivered to the Town Board regarding Palmer Road and Thomas Road, the retention of such deed does not compel a conclusion of acceptance since there is no manifest intent to accept the road exhibited by the Town Board. On the contrary, a review of the minutes of the Town Board meeting demonstrates a lack of intent to formally accept the dedication of the roadways in question. No formal resolution or order of acceptance was prepared or filed by the Town Board nor did the Town Highway Superintendent prepare, file and record an order laying out the highway. Absent demonstrative intent to accept the dedication and formalization of such acceptance as required by law, the

court cannot conclude that acceptance has been accomplished. ***Domus Development Corp. v. Monroe County Pure Water***, 84 AD2d 929 (Fourth Dept., 1981).

Lastley, petitioners' reliance upon the approval of the Planning Board regarding Section 3 of the subdivision as being indicative of acceptance by the municipality is meritless. The municipality's subdivision regulations specifically indicate that approval of the Planning Board of the subdivision plat is not deemed to constitute acceptance of any street by the town. See Section 3.10(a) ***Town of Westford Land Subdivision Regulations***, effective April 17, 1987; Town Law Section 278. Clearly, the action of the Planning Board regarding the subdivision plat does not bind the Town Board to accept a dedication of the streets.

Since none of the grounds asserted by the petitioners support a finding as a matter of law that the Town of Westford has accepted the streets in questions and thus, is under a legal duty to maintain those streets, the court now considers petitioners' allegations concerning refusal of the proffered dedication as constituting arbitrary and capricious conduct. Generally stated, a municipality cannot be compelled to accept an offer of dedication of a street or highway since this decision is one of legislative discretion. ***Stillman v. City of Olean***, 228 NY 322. However, since a legislative body must act reasonably, such discretion must not be exercised in an arbitrary or capricious manner. A court cannot interfere unless there is no rational basis for the exercise of discretion or the action is arbitrary and capricious. ***Matter of Colton v. Berman***, 21 NY2d 322 (1967). If there is no sound basis for the action or such action is taken in disregard of the facts, then it may be concluded that the Board acted arbitrarily and capriciously. ***Matter of Pell v. Board of Education***, 34 NY2d 222 (1974). In a legal sense, administrative action is arbitrary and capricious when it is demonstrated that the administrative body has reached different conclusions on identical facts. ***Italian Sons & Daughters of America v. Common Council***, 89 AD2d 822 (Fourth Dept., 1982).

The petitioners herein do not assert any facts in support of the conclusory allegation that the Town Board has acted in an arbitrary or capricious fashion. Without factual allegations to support such a conclusion, this court is powerless to review municipal action. A court should not impose its judgment on a municipality has been discolored by specific and articulable facts. This court is not convinced that the Board's policy of presently refusing to accept any

new dedications constitutes arbitrary and capricious conduct with respect to the petitioners herein.

In view of the foregoing, the court is compelled to dismiss this proceeding and deny any and all relief sought by petitioners.

All papers are herewith forwarded to the attorney for the respondents for filing with the order which is to be submitted without notice. A copy of this memorandum opinion is to be annexed to the order and incorporated therein by reference.

Dated at Delhi, New York
March 16, 1989.

_____
J.S.C.

2000' Feet) and there are two (2) occupied homes thereon. The Board also stated that the roads did not comply with requirement No. 14 which stated that the base of said roads should have 4" of gravel under a 2" diameter, in spite of the fact that they might have complied with Donovan Plan Specifications.

20. Folling the October 7, 1988 meeting, the Town Board again met on December 2, 1988, at which time a motion was made and seconded, that "it is the board's policy, at the present time, not to take over any new roads".

21. It becomes readily apparent to your petitioners that in spite of petitioner's construction of the roads in question prior to any Planning Board being formed or any Town Subdivision Regulations or any ordinances or resolutions thereafter passed, that the Town Board of Westford does not intend to accept by dedication, resolution or otherwise, petitioner's roads, nort ot maintain or plow the same under any conditions, and that their action is not only arbitrary, capricious and unreasonable, but an undue abuse of their discretionary powers.

22. That in the fall of 1986, Robert Huntington, who was and continues to be the Chairman of the Town Board, announced at a Town Board Meeting, that a Planning Board was soon to be organized and that it should be controlled by a majority of members who were born in the Town of Westford. He further stated that he did not like "newcomers" and that they should not control the Town Board or the Planning Board. Such a statement is discriminatory in nature and is not made in the best interest of the residents and taxpayers in the Town of Westford, whose health, safety and welfare are of paramount importance.

23. That plowing of the roads at Cooper Hills is a necessity and not a luxury as the elevation in said area is 2500' feet, thus resulting in greater precipitation and a heavier accumulation of snow than the Town of Westford, located 2 miles away and several hundred feet below Cooper Hills Estates.

24. That by reason of the Town Board's refusal to accept petitioners' offer of dedication, petitioners have been irreparably damaged both financially and otherwise as hereinafter set fourth; That in October, 1988, petitioners had to purchase a second-hand, Brockway heavy-duty truck with a snow-plow, at a cost of $10,600.00, which equipment is not adequate to handle the snow

accumulation; that you petitioners paid in excess of $12,000.00 in taxes in 1987 and these figures will be exceeded in 1988, as new homes have been constructed since that time. That one of petitioner's tenants has been forced to move from the premises she heretofore rented resulting in a loss of revenue in the sum of $500.00 per month since November, 1988; in addition, petitioners have suffered a loss of sales of the lots located within the Cooper Hills Estates; petitioners have further suffered a loss of rental income on four (4) fully constructed homes for the past two (2) years; petitioners are experiencing an unnecessary tax burden by reason of the loss of lot sales and rental income; petitioners are paying huge interest rates on their total investment of Four Hundred Ten Thousand Dollars ($410,000.00) during the period that the property remains unrented and unsold and petitioners estimate their money damages by reason of the arbitrary and capricious action of the Town Board and the abuse of their discretionary powers, to be in the neighborhood of Five Hundred Thousand Dollars (500,000.00).

25. That failure to plow the roads places the residents in Cooper Hills Estates in danger as ambulances and fire trucks can not get through the unplowed roads. That your petitioners further claim that they, as well as all persons within the jurisdiction of this state, are entitled to equal protection of the laws of the state or any subdivision thereof and thus, where town services are shown to be essential to the health and welfare of a town resident, they can not be withheld by the town nor can a Town Board legislate away, by it's own vote, it's fundamental duty to insure the health, welfare and safety of it's citizen. Moreover, petitioners further claim that the power of a Town Board to accept or reject roads offered for dedication, is not absolute, but is a discretionary power, with good cause controlling the acceptance or rejection. Petitoners further contend that the Westford Town Board Formulated a set of requirements for acceptance of the roads in question, that the petitioners fulfilled each of the requirements and formal approval was made by the Highway Superintendent, the Fire Chief and the Town Planning Board. Thus, the Town Board assumed the role of a principal giving power to their various agents to see that all requirements were met before final approval. The Town Board should thus be bound by the approval of it's.

As a result of the foregoing, the petitioners have instituted this proceeding pursuant to Article 78 of the Civil Practice Law and Rules seeking a judgment in the nature of mandamus to compel the Town of Westford to accept the offer of dedication of the roadways within Cooper Hills Estate. The proceeding is premised upon the municipality having accepted the offer of dedication and/or that in rejecting or failing to accept the dedication, the municipality has acted in an arbitrary and capricious fashion.

The petitioners argue that the respondents have accepted the roads as a result of three separate and distinct actions, namely: (a) representations of the Town Highway Superintendent regarding acceptance of a dedication which representations are binding upon the Town Board, (b) retention of deed of dedication to Palmer Road and Thomas Road by the Town Board, and (c) approval by the Planning Board of Section 3 of the subdivision. If indeed the town has accepted the roadways in question, then the municipality is under a legal duty to maintain said roadways, the remedy of mandamus being available to compel a municipality to perform its legal duty.

Clearly, a town highway superintendent cannot bind a municipality regarding acceptance of proffered

Cognizant that a town cannot be compelled to accept a private road (***see generally, Matter of Hillelson v. Grover***, 105 AD2d 484, 485; ***Carman v. Hewitt***, 105 NYS2d239, 243-244, ***mod on other grounds*** 280 App Div 866, ***affd*** 305 NY 718), petitioners' primary contention on appeal is that because they expended time and money to comply with the Planning Board's recommendations and because the Town Highway Superintendent implied that the dedication would be accepted, the Town Board should be estopped from arbitrarily denying their offer. Neither a town superintendent nor a planning board may bind a municipality to accept a proffered decication absent the town board's consent (***see***, Highway Law § 171; ***Entress v. Sours***, 272 App Div 861; ***Koff v. Frank***, 22 Misc 2d 551, 555). And, in any event, estoppel is generally unavailable against municipalities and their agencies (***see, King v. City of Newburg***, 84 AD2d 388, 394-395; ***see also, Matter of Hamptons Hosp. & Med. Center v. Moore***, 52 NY2d 88, 93-94; ***Matter of Burns v. Regan***, 87 AD2d 944, 946, ***appeal dismissed***

Nor do we find the Town Board's refusal to accept petitioners' roads to be arbitrary or capricious. The uncontroverted record evidence is that the Town has not accepted any roads in the last 30 years. Moreover, petitioners have failed to demonstrate that the Town Board's action lacks a sound basis in reason. Although petitioners suggest, for the first time in their brief, that the Town Board's failure to explain its decision renders it arbitrary, issues not raised in Supreme Court may not be raised for the first time on appeal (10 Carmody-Wait 2d, NY Prac § 70:300, at 564; ***see, e.g., Matter of Desmond v. Jones***, 87 AD2d 902(.

Judgment affirmed, without costs.

MAHONEY, P.J., KANE, YESAWICH, JR., and MERCURE, JJ., concur.